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IN THE

Supreme Court of the United States

October Term — 1962

No. [redacted] 130

MATHIASEN TANKER INDUSTRIES, INCORPORATED

Petitioner

versus

ROBERT LEE MASON

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Harry E. McCoy
Charles R. Dalton, Jr.,
Counsel for Petitioner

SEAWELL, McCOY, WINSTON & DALTON
936 Wainwright Building
Norfolk 10, Virginia

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INTRODUCTION

This Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit, filed by Mathiasen Tanker Industries, Incorporated, presents a single question of law which has never been considered by this Court, but which should be answered in order that there might be a clear and definitive statement of the rights and liabilities of *all* litigants (both plaintiff and defendant) to a jury trial in Jones Act litigation.

This Court has ruled in numerous previous cases that a seaman in a Jones Act case (or the employee in a Federal Employers Liability Act case) is entitled to a jury determination of the shipowner's (or employer's) negligence if there is any evidence, even the slightest, from which an inference of negligence can be made.

However, the converse of that ruling, (viz., the right of the shipowner to a jury determination of the seaman's contributory negligence if there is any evidence, even the slightest, from which an inference of contributory negligence can be made), has never been considered. Thus the question presented in this petition is one of first impression for the Court.

REFERENCE TO PROCEEDINGS BELOW

The divided opinions of the Court of Appeals for the Fourth Circuit are reported at 298 F2d 28. Likewise, they are printed in the Appendix to this Petition with the Majority Opinion by Circuit Judge Boreman at Page 2A and the Dissenting Opinion by Circuit Judge Haynsworth at Page 12A.

There was no written opinion in the District Court for the Eastern District of Virginia, Norfolk Division. The District Court's Judgment Order is printed at Pages 16A in the Appendix hereto.

Actual trial of this case consumed five (5) days after which the jury was requested to return a special verdict in which it answered five specific questions. In answer to question number three the jury found the seaman-plaintiff guilty of contributory negligence. The Fourth

Circuit has ruled that the jury should not have considered that question and has reversed the case for re-trial solely on the question of damages.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C. 1254 (1).

A Judgment of $2,000.00 was entered in favor of the plaintiff-seaman in the District Court on November 16, 1960. Thereafter the plaintiff appealed and the Court of Appeals for the Fourth Circuit heard oral argument in the case on April 12, 1961, but did not render its decision until January 3, 1962, approximately nine months later. A Petition for Rehearing was then filed in the Fourth Circuit on February 2, 1962, and was denied by Order entered in that Court on March 22, 1962.

QUESTION PRESENTED

DOES THE SHIPOWNER IN A JONES ACT CASE HAVE AN EQUAL RIGHT WITH THE SEAMAN TO A JURY DETERMINATION OF CAUSATION, NEGLIGENCE, CONTRIBUTORY NEGLIGENCE AND DAMAGES IN A SINGLE TRIAL?

STATUTES INVOLVED

The principal statute involved is 46 U. S. C. Section 688, known as the Jones Act (Appendix 20A) which simply incorporates the provisions of 45 U. S. C. 51 et seq. (known as the Federal Employer's Liability Act or F. E. L. A.), thus making the F. E. L. A. applicable to shipowners and merchant seamen.

STATEMENT OF THE CASE

The basis of original jurisdiction in the Dictrict Court for the Eastern District of Virginia was the Jones Act, 46 U. S. C. 688, et seq. The plaintiff, Robert Lee Mason, was a merchant seaman who was employed as an Oiler on the American Tanker MISSION CAPISTRANO. This ship is owned by the United States Navy but is operated with civilian personnel by Mathiasen Tanker Industries, Incorporated, pursuant to contract.

As an Oiler, Robert Lee Mason was of course employed in the engineroom force and thus in this case the factual evidence relates in large measure to a proper description and understanding of the physical appearance and layout of the space or compartments occupied by the engine of the ship.

Being a tanker, the engine spaces of the USNS MISSION CAPISTRANO are located in the stern of the vessel. In the immediate after end, is the fireroom where the ship's boilers are located. It is here that the Fireman Water Tender stands watch, tending the ship's boilers. Immediately forward of the fireroom is the ship's main engineroom, there being a water-tight bulkhead between the fireroom and the engineroom with access being obtained via a water-tight door opening on the main floor level. The main propulsion machinery and auxiliaries are located in the main engineroom area. At the extreme forward end of the main engineroom (on the main floor level) there is a control board from which the ship's engines and speed are controlled and regulated.

In both the fireroom and the engineroom there are many levels or gratings to which the crew may ascend or descend from the main floor or main deck level.

The blowers (which are essential to the firing and operation of the ship's boilers) are located on a "Blower Platform" which is three (3) levels or three (3) stories or three (3) decks above the main floor of the ship's fireroom. The area where the blowers are located is known as the fidley and is the uppermost part or very top of the fireroom. Consequently, the temperature in the fidley, being on the top of the ship's boilers, becomes very hot.

The ship's evaporators (which are essential for the conversion of seawater to fresh water) are located on the "Evaporator Flat" which is one level below the main floor or deck of the engineroom. Access to the evaporator flat is via an inclined ladder, (with handrails) extending from the forward part of the main engineroom down to that level.

Consequently, in order to go from the blower platform in the ship's fidley to the evaporator flat, it is necessary to descend a steeply inclined steel ladder (with handrails) a distance of nine (9) feet six (6) inches from the top of the fidley to the cabin deck level; descend a second steeply inclined steel ladder (with handrails) a distance of eight (8) feet from the cabin deck level to the *ship's* main deck level and to descend a third steeply inclined steel ladder (with handrails) from the ship's main deck level, an additional fifteen (15) feet nine (9) inches to the main floor of the fireroom. Thereafter it is necessary to walk through the fireroom, cross through the water tight door opening in the water-tight bulkhead between

the fireroom and the engineroom and then walk forward along the main deck or floor of the engineroom to the fourth steeply inclined steel ladder (with handrails) which leads from the forward part of the main engineroom down to the evaporator flat. (Pages 53-55 Appendix, Shipowner's Brief in Fourth Circuit).

Thus the total distance from the blower platform to the head of the ladder leading from the main engineroom to the evaporator flat is one hundred forty-five (145) feet and extends over three (3) steeply inclined ladders, several steel gratings, the steel plates of the fireroom, the water-tight door opening and the steel plates of the engineroom. (Page 55, Appendix Shipowner's Brief, Supra).

Robert Lee Mason was assigned duty as Oiler on the 12:00 to 4:00 watch on which Third Assistant Engineer Leon A. Roy was the watch officer and Henry Clark was the Fireman Water Tender. About 2:00 p. m. on September 28, 1958, while the ship was at sea, Third Assistant Engineer Roy and Mason were standing at the watch officer's desk in the forward part of the ship's engine room. This desk is nearby the main engine control board. The Third Assistant Engineer decided to make his 2:00 o'clock rounds and left Mason in the engineroom at the ship's controls. Thereafter Roy descended to the evaporator flat via the ladder in the forward part of the engineroom, inspected the machinery on the evaporator flat and then descended to the lower flat which is in the very bottom of the ship, two (2) levels below the floor of the main engine room. He completed his rounds in the very bottom of the ship and within 8 to 10 minutes started back up to the main engineroom by retracing

his route. As he ascended from the lower flat or bottom of the ship to the evaporator flat, the Third Assistant Engineer found Robert Lee Mason sprawled in an unconscious state on the deck of the evaporator flat. (Pages 56-64, Appendix Shipowner's Brief, Supra). First aid was called and Mason was given treatment, being removed first to the ship's hospital and then after radio contact with shoreside facilities, a Coast Guard launch met the vessel about four o'clock that afternoon and removed Mason to the United States Public Health Service Hospital at Charleston, South Carolina.

There were no eye witnesses to describe what happened to Robert Lee Mason or to explain why he was found unconscious at the foot of the ladder on the ship's evaporator flat. In fact, there could be no eye witnesses because the officer of the watch was down in the very bottom of the ship, the Fireman Water Tender was in the ship's fireroom and Mason himself had been left at the ship's controls approximately 8 to 10 minutes before he was found.

There was ample testimony by Merrill E. Cassell, an expert witness called by the plaintiff, (Pages 8-11, Appendix, Shipowner's Brief, Supra) that an experienced and qualified Oiler will never leave the engine controls in the main engineroom unattended while the Watch Engineer is making his rounds.

Mason did not deny that he had been left at the ship's controls by Third Assistant Engineer Roy, but on the other hand testified that he had left the main engineroom around 2:00 o'clock to make his own round oiling various pieces of machinery. This duty required that he

go up to the blower platform to oil the ship's blowers. He presented considerable evidence (which was denied and contradicted incidently) that there was considerable oil spilling from the base of the blowers onto the deck where the blowers are mounted three (3) levels above the ships boilers and that he had to track through this oil at least once every hour. In fact, Mason testified that so much oil dripped out on the deck that it accumulated a depth of one and a half to two inches which simply sloshed around on the deck at all times. (Page 21, Appenedix, Shipowner's Brief, Supra). This means that there would have had to have been between 50 and 100 gallons of oil present at all times. (Page 56, Appendix, Shipowner's Brief, Supra). Mason further testified that he had so much oil on his shoes that they were slippery as banana peels. (Transcript Page 179, Line 12 through 23, App. 20A.) Nevertheless, First Assistant Engineer Webber, who was called to the scene of the accident and who removed Mason's shoes testified that there was no oil, grease or any other foreign substance on those shoes. (Deposition of Lewis H. Webber, Page 11, Line 12 through Page 12, Line 12 App. 21A). Mason's clothing and personal effects, including his shoes were inventoried and sent ashore with him. The inventory was introduced as "Gregory Deposition Exhibit No. 1". Mason did not produce the shoes at the trial or offer any evidence to explain why they were not produced.

Mason contended that he descended in safety the three (3) steeply inclined ladders from the blower platform to the ship's fireroom, walked through the fireroom, crossed through the door in the water-tight bulkhead, walked forward through the engineroom and approached the head of the ladder leading to the evaporator flat and

after he grasped the rails of that ladder, he slipped (due to his oily shoes which were slippery as banana peels) and fell head first down to the evaporator flat.

All of this had occurred in the 8 to 10 minutes after Third Assistant Engineer Roy left Mason, an experienced Oiler, at the ship's controls to answer any orders or bells which may have been sent down from the ship's bridge. Thus the ship's engines were unattended for that short period of time.

During the trial the plaintiff called Dr. Robert Thrasher as a witness and through him introduced evidence, (Pages 11 through 21, Appendix, Shipowner's Brief, Supra), that Mason had been suffering from "chronic anxiety reaction" just a few months prior to his injury and that drugs known as Serpasil and Belbarb had been prescribed for him. Thereafter the plaintiff introduced the very drugs themselves which had been found in Mason's personal effects at the time Mason was removed from the ship. These drugs are Plaintiff's Exhibits Nos. 23 and 24 and were introduced as follows:

Pages 15-16, Appendix, Shipowner's Brief in Fourth Circuit:

"Mr. Kelsey: (Plaintiff's Attorney): If Your Honor please, these will be introduced in evidence on proof by Mr. Mason that they were given him by the Marine Hospital.

The Court: If you want to, for the purpose of the record, you can put them in now.

Mr. Kelsey: I will put them in right now. Also, I will put in a piece of paper with writings on

it which Mr. Mason will testify—in fact, there is a notation on his medical record that he inquired as to what these prescriptions were and they gave him the piece of paper with "Belbarb and serpasil."

The Court: Let the bottles of pills be marked Plaintiff's Exhibits 23 and 24 and the so-called slip, or whatever it is—a prescription blank—be Plaintiff's Exhibit No. 25.

(The articles mentioned were marked Plantiff's Exhibits 23, 24 and 25, respectively, and filed in evidence.)

Dr. Thrasher then testified that these drugs had toxic and side effects, including dizziness, in some people:

Page 18, Appendix Shipowner's Brief, Supra:

Q. (By Mr. McCoy): (Defense Counsel) Now, Doctor, these drugs have certain toxic effects, don't they?

A. Almost any drugs can have a toxic effect. These particular drugs may, in certain individuals. It depends on the dosage level, it depends on the particular reaction of the person that is taking the medicine. One person may have a tremendous side reaction, like that from penicillin, for example, and another person have none. Any drug can have a side reaction and these drugs do have side reactions in some people.

Q. Among the toxic effects of this drug reserpin or serpasil, we find headache, dizziness, nausea, and anorexia, don't we?

A. That is correct; they may have.

Thereafter Mason himself assumed the witness stand and under direct examination by his own attorney testified that he had suffered attacks of vertigo or dizzy spells while working on other ships.

Page 23-24, Appendix, Shipowner's Supra:

By Mr. Kelsey:

Q. Having been afflicted with what was mentioned yesterday as being vertigo—I presume that means dizzy spells—have you had any history of being afflicted with dizzy spells?

A. Well, I had on ships where I have been knocked out with steam or heat, got tired and laid down on the deck.

Q. What ship or ships are you referring to?

A. Well, I have been on about fifty or seventy-five different ships and I can't—in my mind, I just can't say.

Q. Well, how many times?

A. I will say two or three, maybe four.

Page 40-41, Appendix, Shipowner's Brief Supra:

By Mr. McCoy:

Q. Now, prior to September 29, 1958, had you ever suffered any fainting spells while on any other ship?

Mr. Kelsey: If Your Honor please, I would like to make this objection and statement to the

Court and would like to ask the Court to instruct the jury in regard thereto. We do not object to any so-called fainting spells or previous incidents if they have anything to do with this case, but unless counsel for the defendant introduces proof—and the burden is on him to do so—that they had anything to do with this case, I submit that no evidence should be introduced unless it is connected up. Now, we do not object to anything which might have some connection, because the man, in 1945, might have become faint from overworking or something. We do not object to this examination if Your Honor will instruct the jury that such fainting spells, if they occurred, must be connected to this injury, if Your Honor please, to have any probative value.

The Court: Well, you asked him on direct examination whether he had had any and Mr. McCoy is asking him whether he had had any, and if you asked the question, then I think Mr. McCoy has a right to ask that question.

Mr. Kelsey: I agree.

As there were no eye-witnesses and Mason was the only person to testify directly, his testimony was subject to very close scrutiny throughout the trial. His credibility was successfully impeached on at least five different occasions by his prior sworn testimony given in a discovery deposition or by exhibits in evidence. [(1) In discovery he testified his sea experience had been mostly on deck whereas at trial he stated it had been in the engine-room; (2) in discovery he said he never previously fainted on a ship whereas at trial he volunteered the opposite; (3) at trial he said he had not fainted on the S. S. AFRICAN RAINBOW but he identified his own signature to the letter he said he had presented to the U. S. P. H. S. Hospital at Norfolk showing that he had been

found unconscious in the engineroom of the S. S. AFRICAN RAINBOW just ten (10) months before his injury in this case; (4) in discovery he said he did not know if there had been any angle-irons around the base of the blowers, but at trial he described such angle-irons in detail; (5) he identified his signature to his pre-employment physical questionnaire on which he had answered that he had not been under a doctor's care or treatment within five years prior to his employment]. Also, evidence was introduced that he had been convicted of a felony.

At the conclusion of all evidence and argument and after the Court's charge, the jury was asked to return a special verdict in which it answered five questions as follows.

1. Were the defendant, its officers or crew members (other than plaintiff) guilty of any negligence which was a proximate cause of the accident and injuries sustained by plaintiff on September 29, 1958?

   Answered: Yes.

2. Was the vessel MISSION CAPISTRANO unseaworthy as defined in the charge of the Court and was such unseaworthiness a proximate cause of the accident and injuries sustained by plaintiff on September 29, 1958?

   Answered: Yes.

3. Was the plaintiff guilty of any contributory negligence which was a contributing proximate cause of the accident and injuries sustained by plaintiff on September 29, 1958?

   Answered: Yes.

4. On the claim for damages, including any claim for loss of wages, if you conclude that plaintiff is entitled to recover, what amount is the plaintiff entitled to recover?

   Answered: $2,000.00.

5. On the claim for maintenance, on what date did the plaintiff obtain his maximum recovery following his injuries on September 29, 1958, as defined in the charge of the Court?

   Answered: December 24, 1958.

After the District Court's Judgment was entered, Robert Lee Mason appealed to the Fourth Circuit. However, he did not assign any specific error or grounds for his appeal. In his brief, Mason raised only three (3) issues on his appeal. They were:

1. That the District Court had erred in admitting evidence of Mason's prior criminal conviction for a felony.

2. The District Court erred in admitting evidence of prior fainting spells in the engine-room on other ships and admitting evidence of the presence of medicines (bottles of pills) found in Mason's personal effects.

3. Mason asked for a new trial solely on the issue of damages because of the error committed in the first two issues.

As a matter of good faith in performing its moral and ethical obligation not to present a frivolous appeal and realizing that there was adequate conflicting evidence, both direct and circumstantial, to support the jury's verdict, the shipowner did not appeal.

In the Majority Opinion, the Fourth Circuit found that the District Court properly admitted the evidence of the prior felony conviction. Likewise, the Fourth Circuit ruled that the evidence of prior fainting spells and the presence of medicines was properly admitted because it was introduced by the plaintiff himself. However, having found that there had been no error in the two basic issues Mason raised on appeal, the Fourth Circuit then went off on its own initiative and in the Majority Opinion decided that there was no direct evidence from which the jury could make an inference of contributory negligence or causation.

Having thus re-weighed the evidence and substituted its own inferences and conclusions for those of the trial jury, the Majority Opinion then remanded the case to the District Court for re-trial solely on the question of damages.

The Dissenting Opinion, (being in agreement with the action of the District Judge) finds that there was evidence from which a jury could make permissible inferences of contributory negligence and causation and therefore these issues had been properly submitted to the trial jury.

It is from the Majority Opinion and action of the Fourth Circuit in denying the defendant ship-operator a right to a jury determination of causation and of the plaintiff's own contributory negligence that this Petition for Certiorari is filed.

ARGUMENT

This Court's decisions in Federal Employers Liability Act. (F. E. L. A.) cases are equally applicable to Jones Act litigation, *Schulz vs. Pennsylvania R. R. Co.*, (1956) 350 U. S. 523; 76 S. Ct. 608; 100 L. Ed. 668, *Ferguson vs. Moore-McCormack Lines, Inc.*, (1957) 352 U. S. 521; 77 S. Ct. 457; 1 L. Ed. (2d) 511.

Thus in a Jones Act case it is not the function of an appellate court to search the record for conflicting circumstantial evidence in order to take the case away from the jury, because the jury, not the court, is the fact-finding body and appellate courts are not free to re-weigh the evidence or set aside the jury verdict merely because the appellate court can draw different inferences and conclusions or because the appellate court feels that other results are more reasonable, *Tennant vs. Peoria & P. U. R. R. Co.*, (1944) 351 U. S. 29; 64 S. Ct. 409; 88 L. Ed. 520.

The right to a jury trial is "part and parcel of the Employers' Liability Act" which the Jones Act makes applicable to merchant seamen and ship-operators. Therefore the issues of negligence in a Jones Act case call for the exercise of common sense and sound judgment *under the circumstances of the particular case and are questions for the jury to determine, Schulz vs. Pennsylvania R. R. Co.*, (1956) (Supra).

In F. E. L. A. and Jones Act litigation the test of a jury case is simply whether negligence played *any* part, *even the slightest,* in producing the injury and it does not matter that the jury may attribute the result to other

causes, including contributory negligence. "The decisions of the Supreme Court since 1939 teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ." Therefore certiorari will be granted when lower federal courts deprive LITIGANTS of their right to a jury determination, *Rogers vs. Missouri Pacific R. R. Co.,* (1957) 352 U. S. 500; 77 S. Ct. 443; 1 L. Ed. (2d) 493.

Appellate "courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function", *Ferguson vs. Moore-McCormack Lines, Inc.,* (1957) (Supra).

In Jones Act cases the jury (not the Court) has the exclusive power to draw inferences of causation even where there is a complete failure of evidence to connect the result with the alleged negligence. The members of the jury (not the witnesses or the Court) are sworn to make a legal determination of the question of causation and *the jury is entitled to take all the circumstances of the injury into consideration, Sentilles vs. Inter-Caribbean Shipping Corp.,* (1959), 361 U. S. 107; 80 S. Ct. 173.

Moreover in Jones Act litigation, DIRECT evidence is NOT required but CIRCUMSTANTIAL evidence is sufficient to raise a jury question, *Michalic vs. Cleveland Tankers, Inc.,* (1960) 364 U. S. 325; 81 S. Ct. 6.

Furthermore, such evidence and testimony, direct or circumstantial, as is produced by the plaintiff himself,

may be considered by the jury on the issue of the plaintiff's own contributory negligence, *Miller vs. Union Pacific Ry. Co.*, (1933) 290 U. S. 237; 54 S. Ct. 172.

In Jones Act litigation the provisions of the Seventh Amendment are brought into play and an appellate court's search for one possible view of the case which will make the jury's finding inconsistent, results in a collision with the Seventh Amendment which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States; than according to the rules of the common law", *Atlantic & Gulf Stevedores, Inc., vs. Ellerman Lines, Ltd.*, (April 2, 1962) ..... U. S. .....; 82 S. Ct. 780.

The substantive rights or defenses arising under the F. E. L. A. (Jones Act) cannot be lessened or destroyed by a rule of practice. The evidence relating to injury, causation and damages is generally so interwoven that in order to ascertain or determine a fair verdict the *whole* case should be tried at one time before one judge and one jury instead of "splitting it up" between different trials with different judges and different juries, *Norfolk Southern R. Co. vs. Ferebee*, (1947) 238 U. S. 269; 35 St. Ct. 781.

Therefore, the benefit and privilege of a jury decision granted a plaintiff under the Jones Act, even when based on the slightest shred of circumstantial evidence from which an inference of negligence or causation may be drawn, carries with it the concomitant responsibility of having that same jury render a verdict on the whole case, including liability, causation, damages and contributory negligence, even when based on the slightest shred

of circumstantial evidence from which an inference of the plaintiff's own negligence may be drawn.

If the law were otherwise—if the shipowner-employer were not entitled to the same jury determination that has been conferred on the seaman-employee in Jones Act litigation—if the shipowner were not entitled to have the whole case tried before one judge and one jury (instead of partial re-trials which are not to be commended), then the defendant would indeed be denied the due process of law guaranteed under the Fifth Amendment. The very essence of due-process is the "American ideal of fairness" and fair play, (Galvan vs. Press, (1954), 347 U. S. 522; 74 S. Ct. 737; 98 L. Ed. 911). Due process of law requires essential fairness and justice in judicial proceedings, (U. S. ex rel Marelia vs. Burke (D. C. Pa.—1951) 101 F. Supp. 615, affirmed by 3rd Cir. (1952) at 197 F (2d) 856; cert. den. Marelia vs. Burke (1952), 344 U. S. 868; 73 S. Ct. 110; 97 L. Ed. 673). Therefore due process is had when laws affect alike all persons similarly situated. (Vol. 16-A, C. J. S. 543, Constitutional Law No. 567), because there is administration of equal laws.

Therefore if this Court's decisions in *Tennant vs. Peoria & P. U. R. Co.*, (1944), in *Schulz vs. Penn. R. R. Co.*, (1956), in *Rogers vs. Missouri Pacific*, (1957), in *Ferguson vs. Moore-McCormack Lines, Inc.*, (1957) in *Sentilles vs. Inter-Caribbean Shipping Corp.*, (1959), in *Michalic vs. Cleveland Tankers, Inc.* (1960), and in *Atlantic & Gulf Stevedores, Inc., vs. Ellerman Lines, Ltd.*, (1962) are to have any meaning of fairness, fair play and justice in judicial proceedings, they must comport with the due process clauses of the Fifth Amendment and be equally applicable and affect alike all parties (i. e. both the plaintiff and the defendant). This we re-

spectfully submit is the intent and meaning expressed by Justice Brennan in *Rogers vs. Missouri Pacific* (supra) when he speaks of the rights of the LITIGANTS (meaning both plaintiff and defendant) to a jury trial. We refer to Mr. Justice Brennan's language:

77 S. Ct. 443 at 451:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive LITIGANTS of their right to a jury determination."

Having considered the applicable provisions of law, we now turn to a careful and thorough reading of the Fourth Circuit's opinion which reveals that the majority decision is founded on the following excerpts:

FIRST:

> "We find no abuse of discretion in permitting defense counsel to attack the credibility of the plaintiff by inquiring about an earlier felony conviction. Certainly, the credibility of the plaintiff was very much in issue because there were no eye witnesses and he was presenting his own version of the accident." (App. 6A)

SECOND:

> "During the course of the trial in response to questions propounded by his own counsel, Mason testified that on several occasions, from ten months to many years earlier, he had fainted while on duty as oiler in a ship's engineroom. Mason explained the reason he had fainted on each occasion: Once he had influenza; on another occasion while his ship

was operating in the tropics he was overcome by the heat in the engineroom; a third fainting spell was caused by food poisoning; once he was 'lightheaded' because of the 'grippe'." (App. 7A).

THIRD:

"Plaintiff also introduced into evidence two small bottles of pills[2] which had been prescribed for him by the United States Public Health Service Hospital for a nervous condition six months prior to the accident and which were found in his locker aboard ship after the accident. Mason testified that he had not taken any of the pills for the past several months preceding the accident. There was no evidence to indicate that Mason was taking the pills or was subject to their effect in any way just prior to the accident." (App. 8A).

[2]The testimony revealed that the tranquilizer drugs in the pills are known as "Reserpine" and "Belbarb".

FOURTH:

"Here defendant had the burden to prove by a preponderance of the evidence Mason's contributory negligence." (App. 9A).

FIFTH:

"No direct evidence was introduced to meet this burden." (App. 9A).

SIXTH:

"It was, to some extent, apparent that the defendant, by insinuation, would have the jury infer that a fainting spell caused the plaintiff to fall." (App. 8A).

SEVENTH:

"It cannot be reasonably argued that the physical facts involved in the fall could be accepted

as evidence of Mason's failure to grasp the handrails or take other precautionary measures." (App. 9A).

EIGHTH:

It is a matter of common experience that a person can slip on a stairway, due to extremely slippery conditions, with such force that his hands would be loosened from the rail. No inference to the contrary could properly have been drawn by the jury from the evidence in this record." (App. 9A).

NINTH:

"We believe this was error which may have affected the amount of the verdict." (App. 10A).

TENTH:

"Plaintiff appeals from the jury's determination of damages, claiming that the $2,000 award is inadequate." (App. 4A).

ELEVENTH:

"We do not express any opinion on the adequacy of the award as found by the jury." (App. 4A).

TWELTH:

"The jury determined the issue of liability against the defendant and the court entered judgment thereon. The defendant has not appealed." (App. 4A).

THIRTEENTH:

". . . the defendant has not appealed from the adverse determination of the liability issue.' (App. 10A).

FOURTEENTH:

"Defendant's liability having been determined, we are of the opinion that the plaintiff is entitled to a new trial on the sole issue of damages." (App 11A).

The foregong excerpts quoted from the Fourth Circuit's opinion lead to the inescapable conclusion that the appellate court has re-weighed and re-evaluated the evidence and substituted its own inferences and conclusions for those of the jury. Examples of this are:

FIRST: The Fourth Circuit's criticism that the defendant shipowner had the burden to prove Mason's contributory negligence but failed to introduct any DIRECT evidence to meet that burden, simply ignors the applicable law and the evidence introduced by Mason himself and all the other circumstances of the case.

Mason introduced the evidence of his prior fainting spells while on duty as an oiler in a ship's engineroom. Likewise, it was Mason who introduced the evidence of his prior nervous condition and the fact that he had pills (drugs known as Resperine and Belbarb) which had been prescribed for his use just a few months before his injury. If Mason was not using these drugs, why was he carrying them and why did he voluntarily introduce them into evidence? These were part of the "circumstances of this particular case" for the jury to consider, *(Schulz* (supra)). The jury was entitled to know that these drugs are taken for mental disorders and have a side effect of dizziness and to take all these circumstances into consideration even if there was a complete failure of direct evidence to connect these drugs with the injury, *(Sentilles* (supra)).

Yet the Fourth Circuit says that the defendant-shipowner, *(who did not even introduce that evidence)*, may not have the advantage of the plaintiff's own testimony given on his direct examination and his other evidence!

This is indeed a novel and new rule of evidence which completely emasculates the elementary principle that a party is bound by his own testimony and evidence. By thus creating one standard of evidence for the plaintiff and a different standard for the defendant, the appellate court has denied the shipowner both its right to a jury determination and its right to equal protection as implied in the due process clause of the Fifth Amendment.

SECOND: The plaintiff appealed from the jury's award of $2000 contending it was inadequate. The Fourth Circuit stated at the outset that it expressed no opinion on the adequacy of that award. However, the Court of Appeals ruled that permitting the defendant to use and have the advantage of evidence and testimony introduced by the plaintiff himself was error which *may* have affected the *amount* of the verdict.

Obviously, the *amount* of the verdict is the same thing as the *adequacy* of the verdict. Thus we reach the real and underlying reason why the Fourth Circuit reversed the case for re-trial on damages only. That reason is that the Fourth Circuit simply felt the jury's verdict was inadequate. Thus, the Fourth Circuit has found a method to substitute the opinions of two of its judges for the verdict of the jury. In the language of Mr. Justice Brennan in the *Rogers* case (above), it is this type of narrow and niggardly construction by the lower federal and state courts which persistently deprives the LITIGANTS (both plaintiff and defendant) of their right to a jury determination.

THIRD: About 8 to 10 minutes prior to finding Mason on the evaporator flat, Third Ass't Engineer Roy had left

Mason at the engine controls while Roy made his rounds in the bowels of the ship, (Roy Deposition Page 23, Line 23 through Page 25, Line 18). As there were only three men on watch, (one of whom ,was in the fireroom) Mason, an experienced Oiler was expected to stay at the ship's engine controls until Roy's return, (Testimony of Merrill Edward Cassell, an expert witness called to testify by Mason, Pages 63, 64, 65 and 66 of the trial Transcript, App. 22-24A). Nevertheless, Mason obviously left the ship's engine controls completely unattended; otherwise Mason would not have been able to climb to the blower platform, oil the blowers, descend to the fireroom, pass through into the engineroom, walk forward to the steps leading to the evaporator flat and fall down those steps where he was found by Third Ass't Roy as Roy returned from his rounds 8 to 10 minutes later.

Certainly this is evidence which created an inference for the jury to conclude that Mason had left the engine control unattended and was going about his other duties in obvious haste and without proper care for his own safety.

Thus the jury was well justified in inferring that such action amounted to a lack of prudence and reasonable care and at least contributed to the accident.

To paraphrase the language of the *Tennant* case (supra), the very essence of the jury's function was to select from among conflicting inferences and conclusions that which it considered most reasonable. The jury's decision that Mason was guilty of contributory negligence cannot be ignored. The Fourth Circuit was not free to reweigh that evidence merely because two of the three

judges disagreed with the trial jury and District Judge and felt that other results were more reasonable.

FOURTH: Mason's predominant injuries were located about his face. Yet he physically demonstrated to the jury how his foot slipped from under him before he descended the ladder and caused him to fall, (Transcript Page 189, 190); this physicial demonstration was not expressed in words, of course, but from it the jury could well have concluded that had Mason fallen as he demonstrated, then he would have had predominant injuries elsewhere than about his face. Thus, the location of Mason's predominant injuries, considered in light of his own description of the fall, created strong circumstantial evidence that the accident was not caused solely by oily shoes but was at least contributed to by Mason's inattention and lack of due care in starting to descend the stairway.

Therefore, when the Fourth Circuit says:

> "It cannot be reasonably argued that the physical facts involved in the fall could be accepted as evidence of Mason's failure to grasp the handrails or take other precautionary measures. It is a matter of common experience that a person can slip on a stairway, due to extremely slippery conditions, with such force that his hands would be loosened from the rail. No inference to the contrary could properly have been drawn by the jury from the evidence in this record."

it is merely substituting its own inferences and conclusions for those made by the jury. In the language of the *Schulz* case (supra), these issues (inferences and conclusions) are questions for the jury to determine and call for the

exercise of common sense and sound judgment *under the circumstances of the particular case.*

FIFTH: There is not a single shred of evidence in the record that there was any oil on the deck of the engine room which caused Mason to slip and fall. Likewise there is absolutely no evidence or even suggestion in the record that the stairway itself was in an extremely slippery condition as indicated in the Fourth Circuit's opinion. The evidence of 1st Assistant Engineer Webber was that there was no oil or grease on Mason's shoes when Webber removed them immediately after the accident (App. 22A). Therefore it was solely within the jury's function to infer whether or not Mason's fall was caused at least in part by his own inattention and lack of prudence or to take other precautionary measures for his own safety. This is particularly true where the plaintiff's credibility was under very strong and effective attack and when Mason, (whose inventory of clothes and personal effects, including the shoes was sent ashore with him), did not produce or explain the absence of the shoes at trial.

As suggested in the *Ferguson* case (supra), the Fourth Circuit should not have assumed that the jury fell short of a fair performance of its constitutional function.

SIXTH: Mason says that over a period of time his shoes had become so saturated with oil that they were as slippery as banana peelings, but as pointed out above, he did not produce or explain the absence of those shoes at trial. However, he admitted that immediately before his accident he had descended three (3) steeply inclined steel stairways or ladders from the blower platform to the floor of the fireroom, a vertical distance of 45 or 50 feet; he had then walked horizontally another 25 or 30 feet

through the fireroom, stepped into the engineroom and walked along on the steel deck; all of the foregoing was without any difficulty or trouble at all, because Mason had wiped his shoes off and had held on tightly to the three (3) vertical or steeply-inclined ladders, (Transcript Page 224, Line 9 through Page 231, Line). At the same time he did not deny that 3rd Assistant Engineer Roy had left him alone at the ship's engine controls in the main engineroom just 8 to 10 minutes before his injury. In view of the physical features and distance involved, Mason would have been compelled to have hurried — almost run — to have made the trip from the engine controls up to the blowerflat, oiled the blowers and returned.

The jury was certainly entitled to draw the inference from Mason's foregoing testimony that his own inattention and lack of prudence was at least a contributing cause to his accident, particularly in view of the ease and lack of difficulty encounted in descending the three similar ladders from the blower platform.

As this Court held in the *Sentilles* case (supra), the jury was entitled to take *all* the circumstances, including the physical appearance and dimensions into consideration. Therefore the jury's power to draw an inference of the plaintiff's own contributory negligence was not impaired by the failure of any witness to testify that such contributory negligence was in fact a cause of the injury.

SUMMARY

The foregoing facts, reviewed under the principles established in eight prior decisions of this Court, demonstrate clearly that the Fourth Circuit has emasculated the basic rule of evidence that a party is bound by his own

testimony and evidence he voluntarily introduces; that the Fourth Circuit has ignored this Court's decision in *Michalic vs. Cleveland Tankers, Inc.*, (supra) that DIRECT evidence is *not* required; that the Fourth Circuit has refused to adhere to this Court's decisions in *Schulz vs. Pennsylvania R. R. Co.*, (supra) that the issues in a Jones Act case call for the exercise of common sense and sound judgment under the circumstances of the particular case and are questions for the jury to determine and in *Sentilles vs. Inter-Caribbean Shipping Corp.*, (supra) that the jury is entitled to take *all* the circumstances of the injury into consideration even where there is a complete failure of direct evidence to connect the result with the alleged (contributory) negligence; that the Fourth Circuit, contrary to this Court's decision in *Ferguson vs. Moore-McCormack Lines, Inc.*, (supra) should not have assumed that in determining the questions presented to it the trial jury fell short of a fair performance of its constitutional function; that the Fourth Circuit has completely circumvented the mandate of this Court as expressed in *Tennant vs. Peoria & P. U. R. R. Co.*, (supra) and in *Rogers vs. Missouri Pacific R. R. Co.*, (supra) by re-weighing, re-evaluating the evidence and by substituting the inferences and conclusions of two of its three judges for those of the trial jury, thereby depriving the LITIGANTS, both plaintiff and defendant, of their right to a jury trial; that the Fourth Circuit has overlooked this Court's decision in *Miller vs. Union Pacific Ry. Co.*, (supra) that the evidence and testimony voluntarily produced by the plaintiff himself may be considered by the jury on the issue of the plaintiff's own contributory negligence; and finally, the Fourth Circuit has modified and changed the dictate of this Court in *Norfolk Southern Ry. Co. vs. Ferebee*, (supra) that partial re-

trials are *not* to be commended but in F. E. L. A. (Jones Act) cases the whole case as to causation, negligence, contributory negligence and damages should be tried at one time before one judge and one jury instead of "splitting it up" between different trials with different judges and juries.

CONCLUSION

By ignoring and emasculating the doctrine and mandate established by this Court's decisions in the eight cases cited above, the Fourth Circuit also violated the most recent pronouncement in *Atlantic & Gulf Stevedores, Inc., vs. Ellerman Lines Ltd.,* (supra) that in Jones Act litigation the Seventh Amendment is brought into play and therefore the Fourth Circuit's search for one possible view or result that was inconsistent with the jury's findings results in a collision with the Seventh Amendment.

These nine prior Supreme Court decisions, spanning the years of 1944 through 1962, define without equivocation that a seaman in a Jones Act case is entitled to a jury determination of the shipowner's negligence and causation, if there is any evidence, even the slightest, from which an inference of negligence or causation can be made.

Unless the shipowner is going to be denied the due process of law guaranteed in the Fifth Amendment, that shipowner is entitled to an equal application of these same nine decisions and therefore is entitled to a jury determination of the seaman's contributory negligence

and causation, if there is any evidence, even the slightest, from which an inference of contributory negligence or causation can be made. Thus —

THE SHIPOWNER IN A JONES ACT CASE HAS AN EQUAL RIGHT WITH THE SEAMAN TO A JURY DETERMINATION OF CAUSATION, NEGLIGENCE, CONTRIBUTORY NEGLIGENCE AND DAMAGES IN A SINGLE TRIAL.

As Mathiasen Tanker Industries, Inc., has been denied its "equal right" in this case, a Writ of Certiorari should be granted.

Mathiasen Tanker Industries, Inc.,

Respectfully submitted,

Harry E. McCoy

Charles R. Dalton, Jr.,

Of Counsel

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 8312.

ROBERT LEE MASON,
Appellant,

versus

MATHIASEN TANKER INDUSTRIES, INCORPORATED,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued April 12, 1961. Decided January 3, 1962.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BOREMAN, Circuit Judges.

Sidney H. Kelsey for Appellant, and Harry E. McCoy (Seawell, McCoy, Winston & Dalton on brief) for Appellee.

BOREMAN, Circuit Judge:

Plaintiff, Robert Lee Mason, was a seaman oiler on the tanker "Mission Capistrano," owned by the United States Navy but operated under license by the defendant, Mathiasen Tanker Industries, Inc. On September 29, 1958, plaintiff fell while aboard and was injured. In his action to recover damages, he complains, (1) under the Jones Act, that his injuries were caused by the negligence of the employer-defendant and (2) by the unseaworthiness of the vessel.

During a trial which lasted several days, the jury heard much conflicting evidence on the issue of defendant's liability for negligence and unseaworthiness. It was shown that Mason's work required him to hourly oil the bearings on two blowers located on a platform near the top of the multilevel engineroom. Plaintiff's witnesses testified that the blower bearings leaked oil and that there was, during a great part of every day, excessive oil on the deck of the blower platform and that plaintiff was required to wade through this oil in the performance of his regular duties. Defense witnesses either denied the presence of any oil on the blower platform or questioned the amount of oil there. Plaintiff claimed that his shoes became soaked with oil from the blower platform deck and this oil in his shoes soles caused him to slip while descending the steep steel stairs (called ladders aboard ship) connecting the several levels of the engineroom and to fall down an inclined ladder, equipped with handrails, landing on the steel evaporator flat which is one level below the floor of the main engineroom. There were no eye witnesses to the accident. It is undisputed, however, that plaintiff sustained serious injuries in the fall and that he had to

be removed from the ship at sea to a hospital in Charleston, South Carolina, and from there transferred to the United States Public Health Service Hospital in Savannah, Georgia. He was hospitalized from the time of the injury until October 21, 1958, when he was discharged and certified as fit for duty within a week's time. Mason returned to Norfolk, Virginia, and was there examined by a psychiatrist. He was again certified as fit for duty on November 3, 1958, by the Norfolk Marine Hospital where he was an out-patient. After filing this action on November 14, 1958, Mason returned to the Norfolk Marine Hospital for urther out-patient treatment. He was again discharged as fit for duty on December 24, 1958.

A special verdict was returned by the jury as follows:

"VERDICT OF JURY

"1. Were the defendant, its officers or crew members (other than plaintiff) guilty of any negligence which was a proximate cause of the accident and injuries sustained by plaintiff on September 29, 1958?

Yes [x] No [ ]

"2. Was the vessel MISSION CAPISTRANO unseaworthy as defined in the charge of the Court and was such unseaworthiness a proximate cause of the accident and injuries sustained by plaintiff on September 29, 1958?

Yes [x] No [ ]

"3. Was the plaintiff guilty of any contributory negligence which was a contributing proximate cause

of the accident and injuries sustained by plaintiff on September 29, 1958?

YES [x] No [ ]

"4. On the claim for damages, including any claim for loss of wages, if you conclude that plaintiff is entitled to recover, what amount is the plaintiff entitled to recover?

$2,000.00

"5. On the claim for maintenance, on what date did the plaintiff obtain his maximum recovery following his injuries on September 29, 1958, as defined in the charge of the Court?

December 24, 1958"

Plaintiff appeals from the jury's determination of damages, claiming that the $2000 award is inadequate in view of the serious nature of his injuries, his loss of wages over an extended period of time (he claims that he was able to work less than three months during the period from the date of injury to the trial in January 1960) and his pain and suffering at the time of the accident. He contends that the alleged inadequate verdict was the result of errors committed during the course of the trial. We do not express any opinion on the *adequacy* of the award as found by the jury, but we conclude that the plaintiff is entitled to a new trial on the sole issue of damages. The jury determined the issue of liability against the defendant and the court entered judgment thereon. The defendant has not appealed.

Plaintiff first argues that the District Judge abused his discretion in permitting defendant's counsel to ask him

(Mason), on cross-examination, if he had ever been convicted of a felony in Virginia. The judge, who had been forewarned that defense counsel would ask such a question and that plaintiff's counsel would object, prepared a written statement which he read to the jury after the question was asked and the plaintiff was required to answer. A portion of the record is reproduced below.[1]

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[1] (By Mr. McCoy) Mr. Mason, have you ever received a criminal conviction of a felony in Virginia?

MR. KELSEY: If Your Honor please, this is very unfair. I want to make an ojection to this.

THE COURT: Now, let's not make a speech. We have been over this before.

MR. KELSEY: I raise my objection and ask the Court to instruct the jury about such a question.

THE COURT: All right. Get your objection in first.

MR. KELSEY: I object to the Court's admitting any conviction of a felony in this case, the proposed or proffered offer to prove such a felony being almost twenty years ago, on the grounds that it has no probative value, it is immaterial and irrelevent in every way and, further, upon the objection and ground that his own watch officer has testified, and will testify in a deposition to be introduced in this case, that the man is an honest or truthful man, so far as he knows, and that something that happened twenty years ago has nothing whatsoever to do with this case and I object to it.

THE COURT: The objection is overruled. After you get the answer, though, I want to tell the jury something.

MR. McCOY: I understand that.

Q. I ask you the question, Mr. Mason, have you ever received a criminal conviction of a felony in Virginia?

A. I have, and also—

MR. KELSEY: Just a moment, You have, and that is all.

THE COURT: Ladies and Gentlemen of the Jury, I would like to make a few comments with respect to that portion of this evidence. In a conference prior to the trial of this case, counsel for the defendant advised the Court and opposing counsel that they intended to introduce in the record the plaintiff's prior conviction of a felony during the year 1939, I believe.

Is that correct, Gentlemen?

MR. McCOY: Yes, sir.

MR. KELSEY: Yes, sir.

We find no abuse of discretion in permitting defense counsel to attack the credibility of the plaintiff by inquiring about an earlier felony conviction. Certainly the credibility of the plaintiff was very much in issue because there were no eye witnesses ad he was presenting his own version of the accident. The District Judge carefully pointed out to the jurors that a long period of years had elapsed since the conviction and that plaintiff had paid his debt to society for that violation of the law; the conviction was to be considered by the jury only as affecting the plaintiff's credibility and was not to be used as a basis for penalizing him in the determination of damages. *Goddard* v. *United States*, 131 F. 2d 220 (5th Cir. 1942), involved

THE COURT: It is a generally accepted rule that where a witness or a party litigant testifies in a case, evidence of a prior conviction of a felony involving moral turpitude may be considered by the jury in determining the credibility of the evidence of the party testifying. The Court has examined the conviction in question and it does involve a crime involving moral turpitude.

MR. KELSEY: May we ask the Court to state what that conviction was?

THE COURT: Yes, sir, if you want it. The conviction was for store breaking. It is solely for this purpose that this evidence is admissible. The person charged with a crime in 1939 has paid his debt to society and under no circumstances should you as jurors hold against him the fact that he may have erred of committed a crime approximately twenty years ago—in fact, now, I guess, almost twenty-one years ago—at a time when he was then approximately nineteen years old; you may, however, consider the fact of a prior conviction of a felony in determining the extent of the credibility of the plaintiff's testimony as given by him from the witness stand. Of course, Ladies and Gentlemen, we are not concerned with the plaintiff's credibility in 1939; what we want to ascertain is his worthiness of belief in the year 1960, that is, today as he testifies, and the fact that the conviction took place a little more than twenty years ago, at a time when the plaintiff was of a youthful agve, may be considered by you in determining whether this prior conviction has any bearing upon his present credibility.

Finally, may I say to you, if you ultimately conclude that this plaintiff is entitled to recover in this case, he should not be penalized one cent for the fact that he has previously been convicted for a crime in 1939.

All right. You may proceed with the next question.

a criminal prosecution, but there a witness was questioned about a felony conviction some twelve years earlier. Appropriate in this case is the language of that court as follows:

> "• • • It is well settled that such evidence is admissible for purposes of impeachment, and whether the circumstances of the conviction was such that the fact ceased to have probative value was a question addressed to the sound discretion of the trial court: that discretion was not abused by the admission of this evidence." 131 F. 2d at 221.

Cf. Sinclair Refining Co. v. *Southern Coast Corp.*, 195 F. 2d 626 (5th Cir. 1952); *Fire Ass'n of Philadelphia* v. *Weathered*, 62 F. 2d 78 (5th Cir. 1932). The fact that here the witness is a party to the litigation is immaterial. Where a party elects to make himself a witness he may be cross-examined as such. *Simon* v. *United States*, 123 F. 2d 80, 85 (4th Cir.), *cert. denied*, 314 U. S. 694 (1941).

Plaintiff next contends that the court erred in submitting to the jury the issue of plaintiff's contributory negligence. We have read the entire record of the trial and we fail to find any evidence of contributory negligence on the part of plaintiff. During the course of the trial in response to questions propounded by his own counsel, Mason testified that on several occasions, from ten months to many years earlier, he had fainted while on duty as oiler in a ship's engineroom. Mason explained the reason he had fainted on each occasion: Once he had influenza; on another occasion while his ship was operating in the tropics he was overcome by the heat in the engineroom; a third fainting spell was caused by food poisoning; once

he was "lightheaded" because of the "grippe." Plaintiff also introduced into evidence two small bottles of pills[2] which had been prescribed for him by the United States Public Health Service Hospital for a nervous condition six months prior to the accident and which were found in his locker aboard ship after the accident.[3] Mason testified that he had not taken any of the pills for the past several months preceding the accident. There was no evidence to indicate that Mason was taking the pills or was subject to their effect in any way just prior to the accident. Mason was cross-examined at length concerning these matters but the defendant was unable to show any specific connection between the earlier fainting spells and the pills, and the accident. Mason steadfastly denied that he fainted at the time of the accident. It was, to some extent, apparent that the defendant, by insinuation, would have the jury infer that a fainting spell caused the plaintiff to fall.

The District Judge carefully instructed the jury that all evidence as to the pills should be disregarded. However, the court charged the jury concerning contributory negligence and the effects of such negligence on its verdict if it should find that the plaintiff's own negligence contributed to his injury. There was no attempt to call to the jury's attention any evidence which might tend to prove contributory negligence, and our inspection of the record has failed to reveal any such evidence which the court might properly have told the jury to consider. It was clear to the court that the evidence did not disclose any relation-

[2] The testimony revealed that the tranquilizer drugs in the pills are known as "Reserpine" and "Belbarb."

[3] It is explained that plaintiff's counsel was aware of defendant's knowledge of the fainting spells and the discovery of the pills; also, he had reason to believe that if the plaintiff failed to mention these facts on his direct examination, defense counsel would bring them out on cross-examination and thus create the false impression with the jury that the plaintiff was deliberately concealing information.

ship between the pills and accident and the jury was told, in effect, that it could not find the plaintiff's injury was in part caused by taking the medicine which had been prescribed for him. There was no evidence tending to show even the remotest connection between the earlier fainting spells experienced by the plaintiff and his fall down the ship's ladder. Nor was there evidence to link the accident with Mason's sickness some five months earlier, diagnosed as "anxiety reaction," a symptom of which, according to testimony, *may* be faintness. After treatment in March 1958, Mason was declared fit for duty, and there is no evidence to show that he knew or had reason to believe that he was subject to fainting spells as a result of the illness experienced in the spring before the accident.

No witness testified that plaintiff failed to grasp the handrail which was provided for anyone using the ladder, or that he failed, in any respect, to take proper precaution to insure his own safety. Juries cannot be permitted to speculate on what might or could have happened without supporting evidence. Here defendant had the burden to prove by a preponderance of the evidence Mason's contributory negligence. *United States* v. *Smith*, 220 F. 2d 548 (5th Cir. 1955). No direct evidence was introduced to meet this burden. It cannot be reasonably argued that the physical facts involved in the fall could be accepted as evidence of Mason's failure to grasp the handrails or take other precautionary measures. It is a matter of common experience that a person can slip on a stairway, due to extremely slippery conditions, with such force that his hands would be loosened from the rail. No inference to the contrary could properly have been drawn by the jury from the evidence in this record. Counsel for the plaintiff requested the court to charge the jury that there was no

showing of any connection between the fainting spells and the accident and no evidence whatever of any negligence on the part of the plaintiff which contributed to his injuries. Instead, the charge was given concerning contributory negligence and the jury was permitted to speculate that in some way the plaintiff's own negligence may have caused him to fall. We believe this was error which may have affected the amount of the verdict.

Defendant contends that *if* a new trial is awarded there must be a relitigation of the liability issue as well as the issue of damages. No authority is cited to support this contention. Rule 59(a), Federal Rules of Civil Procedure, 28 U.S.C.A., expressly provides for the granting of a new trial "on all or part of the issues * * * in an action in which there has been a trial by jury * * *." It is well settled that, in admiralty cases, contributory negligence may minify plaintiff's damages but a finding of such negligence does not automatically defeat plaintiff's claim of liability against the defendant for injuries resulting from unseaworthiness or negligence. The issues of liability and damages are clearly separable although this court has indicated cognizance of the fact that the size of the verdict may, in itself, indicate a jury compromise of the liability issue and a finding for plaintiff based primarily on sympathy.[4] Mason here appeals from the finding of contributory negligence resulting in a verdict of challenged adequacy and the defendant has not appealed from the ad-

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[4] See Schuerholz v. Roch, 58 F. 2d 32 (4th Cir.), certiorari denied, 287 U. S. 623 (1932); Southern Ry. v. Madden, 224 F. 2d 320 (4th Cir. 1955); Southern Ry. v. Madden, 235 F. 2d 198 (4th Cir.), certiorari denied, 352 U. S. 953 (1956). See also as to separability of awards for compensatory and punitive damgaes Atlantic Coast Line R.R. v. Bennett, 251 F. 2d 934 (4th Cir. 1958).

verse determination of the liability issue. There was ample evidence to support the jury's finding of defendant's liability and nothing to point the finger of suspicion to the verdict on that issue as a compromise. Where the issues are separable and error is found in the trial of only one, a new trial may be had as to that issue alone where no injustice will result therefrom. *Indamer Corp. v. Crandon*, 217 F. 2d 391 (5th Cir. 1954); *Yates* v. *Dann*, 11 F.R.D. 386 (D. Del. 1951); 6 Moore, Federal Practice, para. 59.06, p. 3759 ff. (1953); cf. *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931). Defendant's liability having been determined, we are of the opinion that the plaintiff is entitled to a new trial on the sole issue of damages.[5]

Reversed and remanded for new trial on damage issue alone.

[5] On a retrial, proper evidence, if any, of plaintiff's contributory negligence may be presented to the jury in mitigation of damages.

HAYNSWORTH, Circuit Judge, dissenting:

I would affirm.

There was no direct testimony that Mason did not grip the handrails of the ladder, as he testified he did. There could be no direct testimony on the point, aside from Mason's own, for Mason was alone at the time. The jury might reasonably have drawn the inference that he was not holding on to the handrails with each of his hands from the fact of his fall and the extent of his injuries. The handrails are provided as means by which members of the crew could protect themselves from a slip of the foot when descending the ladder. Mason, himself, recognized in his testimony that due care on his part required that he grip them firmly with either hand. He said his foot slipped on the main engine room deck before he had actually placed a foot upon the ladder, but he was approaching it and had already firmly grasped the handrails. If he had done that, the jury might reasonably have concluded that he would not have fallen, or would have checked his fall at the main engine room level and would have fallen all the way to the deck below. I think the jury could reasonably find that the handrails, properly used, would have served their intended purpose. Of course, the jury might have drawn the other inference too, but ultimate inferences from evidentiary facts are for the jury. Bearing in mind the fact of the fall and the circumstances, there seems to me a permissible inference that Mason was not firmly holding on to the handrails.

On the contributory negligence point, the burden of persuasion was upon the ship's operator, but that does

not mean that the issue may not go to the jury, unless the issue arises upon testimony affirmatively offered by the defense. It can arise from the testimony introduced by the claimant, and, in considering the submissibility of the issue, that testimony should be viewed in the light most favorable to the defense. The jury was not bound to accept Mason's testimonial assertion that he held on to the handrails. Though there was no direct contradiction of that assertion, because no one was present to give any other testimonial version of the occurrence, the fall and the surrounding circumstances seem to furnish a reasonable basis for an inference that Mason did not hold on to the handrails as he claimed. If that be so, the issue of contributory negligence was properly submitted to the jury.

In the familiar situation of the railroad grade crossing accident where the motorist testifies that he looked but did not see the train, the physical circumstances may make his testimonial assertion so incredible that the court should withdraw the plaintiff's case from the jury. If the physical facts are not conclusively persuasive of the incredibility of the testimonial assertion, the inference is one for the jury. Whether the physical circumstances are such as to require, or merely to permit, an inference contrary to the testimonial assertion of the motorist, the inference may be drawn out of the physical circumstances, notwithstanding the fact that there is no direct contradiction of the testimonial assertion.

If our differenes were limited to our appraisal of the sufficiency of the evidence to support the submission to the jury of the question of contributory negligence, I would be inclined to defer to the view of my brothers, for a dissent founded upon such differences serves little purpose.

I am moved to express my views, however, for the terms of the remand seem to me at variance with the established policies of this court.

At the trial, there was a conflict in the evidence bearing upon the claimed negligence of the ship's operator and the claimed unseaworthy condition of the ship. There was ample evidence to support a finding that there was no oil on the deck of the blower platform, no oil on the plaintiff's shoes, no negligence of the ship's operator, and no unseaworthy condition which contributed to the injury. The jury, to which the whole case was submitted, resolved the issue of primary negligence and unseaworthiness in Mason's favor, but resolved the issue of contributory negligence against him and found damages in his favor in the sum of only $2,000. His principal ground of appeal is inadequacy of the damages. His attorney asserts that Mason's damages, including loss of wages, would conservatively be estimated in the neighborhood of $35,000. There is much reason to suppose that the jury did in fact compromise the issues of liability and of damages. The verdict, on the whole, was much more favorable to the defense than to Mason. There is nothing to demonstrate that the jury which heard the case, if the issue of contributory negligence had been withdrawn from it, would have found the ship at fault and have awarded Mason his damages in full measure. Any jury, which had the case submitted in full to it, might well find that the ship was without fault and deny any recovery to Mason.

If there is to be a retrial, I think the retrial should be on the whole case, so that the issues of liability and damages may be determined by the same jury at the same sitting. This has been the consistent position of this court in cases which I find altogether comparable. Atlantic Coast Line Railroad Company v. Bennett, 4 Cir., 251 F. 2d 934; Southern Railway Company v. Madden, 4 Cir., 235 F. 2d 198; Southern Railway Company v. Madden, 4 Cir., 224 F. 2d 320; Schuerholz v. Roach, 58 F. 2d 32.

From repeated reference to the fact that the ship's operator did not appeal from the judgment against it, there is intimation that it may have thereby prejudiced its right to a retrial of the whole case, if it is to be retried at all. On the conflicting evidence, there was no basis for an appeal by the ship's operator. It had no alternative, except to support the judgment against it for the very modest amount of money awarded to Mason by the jury. The fact that it did not take a baseless appeal should have no adverse effect upon its rights at a subsequent trial. Nor should the absence of a cross appeal becloud the fact that the jury which heard the case may have tailored its findings on the issues of negligence and contributory negligence to fit a predetermined damage award, an award which Mason claims to be shockingly inadequate.

Under these circumstances, if there is to be a new trial of any issue, I think the issue of liability, as well as of damages, should be retried and both issues submitted to another jury.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

ROBERT LEE MASON,

Plaintiff,

versus

MATHIASEN TANKER INDUSTRIES, INCORPORATED,

Defendant.

CIVIL ACTION

No. 2856

JUDGMENT ORDER

This case came on for trial on January 19, 20, 21, 25 and 26, 1960, at which time all evidence was presented and the issues were submitted to a jury for determination. Having considered the evidence, arguments of counsel and charge to the Court, the jury did return a verdict on January 26, 1960, and in answer to the special questions propounded to it by the Court, the jury found as follows:

1. that the defendant was guilty of negligence which was a proximate cause of the accident and injuries sustained by plaintiff on September 29, 1958;

2. that the USNS MISSION CAPISTRANO was unseaworthy and that such unseaworthiness was a proximate cause of the accident and injuries sustained by plaintiff on September 29, 1958;

3. that the plaintiff was guilty of contributory negligence which was a contributing proximate cause of the accident and injuries he sustained on September 29, 1958;

4. the jury found and granted a net recovery in the amount of Two Thousand Dollars ($2,000.00) in favor of the plaintiff and against the defendant; and

5. that the date on which the plaintiff attained his maximum physical recovery was December 24, 1958.

The Court finds from the evidence and pleadings herein that the plaintiff, Robert Lee aMson, is entitled to maintenance which had not been paid at the time of the jury's verdict, beginning on November 1, 1958, and extending through November 19, 1958, a total of nineteen days and thereafter the plaintiff was entitled to a second period of maintenance beginning December 15, 1958, and extending through December 24, 1958, a total of ten days, each such period bearing interest at the rate of 6 per cent per annum, payable each week, said maintenance amounting to Two Hundred Thirty-two Dollars ($232.00).

The plaintiff having filed herein on February 4, 1960, a Motion to set aside the jury's verdict and the Court having heard argument of the said Motion on November 1, 1960, and fully considered the same, it is hereby ORDERED that the Motion of plaintiff to set aside the jury's verdict be and the same hereby is overruled and denied, to which action of the Court the plaintiff notes his exception.

It is further ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the plaintiff, Robert Lee Mason, against the defendant, Mathiasen Tanker Industries, Incorporated, in the sum of Two Thousand Two Hundred Thirty-two Dollars ($2,232.00) representing the jury verdict of damages in the sum of Two Thousand Dollars ($2,000.00) and the Court's award of maintenance in the sum of wo Hundred Thirty-two Dollars ($232.00) with interest computed on the jury's verdict of Two Thousand Dollars ($2,000.00) for damages from the date of that verdict, January 26, 1960, and with interest on the maintenance computed on the weekly balances from the date of original entitlement, beginning November 1, 1958.

And it appearing to the Court from the Plea of Tender filed herein by the defendant on March 23, 1960, and Order entered herein on March 23, 1960, that the defendant has tendered into the Registry of the Court the total sum of Two Thousand Three Hundred Two and 22/100 Dollars ($2,302.22) in payment of the judgment as follows:

Jury Verdict	$2,000.00	
Interest thereon from Jan. 26, 1960, thru Mar. 26, 1960	20.00	$2,020.00
Maintenance Terminating Dec. 24, 1958	232.00	
Interest to Apr. 1, 1960	20.02	252.02
Court Costs	30.20	30.20
Total Tender and Deposit		$2,302.22

It is further ORDERED that all obligations and liability on the part of the defendant, Mathiasen Tanker Industries, Incorporated, arising out of the jury's verdict and the Court's judgment entered herein have been fully satisfied, discharged and cancelled by defendant's tender as set out above, it is hereby

ORDERED, ADJUDGED AND DECREED that this matter be dismissed and stricken from the docket and all bonds and stipulations given by any of the parties herein be and the same hereby are released, canceled and discharged. (S.H.K.) To all of which action of the Court, the plaintiff objects and excepts.

(SGD) WALTER E. HOFFMAN
United States District Judge

November 16th, 1960
Norfolk, Virginia

Seen: objected and excepted to:
(Sgd) SIDNEY H. KELSEY
Attorney for Robert Lee aMson

Seen:
(Sgd.) SEAWELL, McCOY, WINSTON & DALTON
Attorneys for Mathiasen Tanker Industries, Incorporated

Title 46 U. S. Code Section 688:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

Rober Lee Mason

Transcript, Page 179, Lines 12 through 23:

Q. What did you use to wipe your feet off with?

A. Rags.

Q. And where did you have rags?

A. I always carried a big rag in my picket with me.

Q. Would you tell us what effect this oil that you had to go through in oiling the blowers over here had on the leather soles of your shoes?

A. It would soak into the leather of my shoes and finally got as slippery as a banana peeling. That is why I had two pairs of shoes, but eventually both pairs was the same.

LEWIS H. WEBBER

Deposition, Page 11, Line 12 through Page 12, Line 20:

Q. Did you assist in removing his clothing in any way?

A. Yes, I took off his shoes.

Q. Did you look at his shoes?

A. Yes.

Q. What did you see?

A. A pair of shoes.

Q. Anything unusual about them?

A. No, just a pair of shoes which were worn.

Q. What kind of shoes were they?

A. They were brown dress shoes, eventually at one time were dress shoes, and they were worn, scuffed up, in the process of being used as work shoes.

Q. What kind of soles did they have?

A. Leather.

Q. Did you see anything on the soles of those shoes?

A. No, sir.

Q. On the heels?

A. No.

Q. Are you telling us that they were clean?

A. Well, I wouldn't say any shoe is clean if it is worn. Like any other shoe, worn to a certain degree. It is like an old shoe. I don't know that much about shoes.

Q. Did you see any grease or oil on the shoes?

A. No, nothing, just the shoe was worn.

Q. Did you have any conversation with Mason?

A. I talked to Mason after I got his shoes off and I tried to make him as comfortable as possible. I said to him, "Mason," I said, "what happened?"

He said, "I fell in the blower flat."

I said, "What blower flat?"

He said, "Up in the forced draft blower flat."

That is all I said to him then.

MERRILL EDWARD CASSELL

Trial Transcript, Page 63, Line 22 through Page 66, Line 15.

Q. Well, sir, when you were third assistant you had the twelve-to-four watch, didn't you?

A. I have stood all watches.

Q. Well, as third assistant you normally took the twelve-to-four watch, didn't you?

A. Normally, yes.

Q. Is that what you testified to here before?

A. Yes, sir.

Q. And I believe you say on those watches you normally have one oiler and one fireman with you, don't you?

A. Yes, sir.

Q. And where you have an experienced oiler you don't have to direct and instruct him in everything he does, do you?

A. No.

Q. You expect an experienced oiler to know what to do, don't you?

A. Sure.

Q. Now, where you do have these three men on watch — the officer, the oiler, and the fireman — where does the fireman stay?

A. In the fire room.

Q. And the fire room is in a separate compartment, actually, from the main engine room, isn't it?

A. Yes, sir.

Q. There is a water-tight bulkhead between the two, isn't there?

A. Yes, sir.

Q. And the oiler stays where?

A. He roams throughout the engine room. When he is standing idle he is with the engineer.

Q. And where is the engineer stationed?

A. By the control platform.

Q. Does the engineer make any rounds during the course of a watch?

A. That is his job.

Q. That is his job, so he has to leave the control platform periodically?

A. Yes, sir.

Q. When he leaves the control platform, who stays at the controls?

A. Leaves the oiler there.

Q. Well, when the engineer leaves to make his rounds, does he normally tell the oiler to stay at the controls?

A. If the oiler doesn't know enough to stay there, yes.

Q. But if it is an experienced oiler and he sees the engineer of the watch leave the controls, the experienced oiler knows he is to stand by the controls, doesn't he?

A. Yes, sir.

Q. And why does an engineer have to stay by the controls in the engine room?

A. Well, they still couldn't hold the oiler responsible for anything that happened.

Q. Just answer my question, Mr. Cassell.

A. Well, if the ship has to stop for a while, there has got to be somebody there to stop it. If the telephone rings, somebody has to answer the telephone.

Q. If a message comes from the bridge to change the gear to a stop, a man has to be there at the control panel to do it, doesn't he?

A. Yes, sir.

Q. And the experienced third assistant engineer knows that an experienced oiler is going to stay there when the third assistant engineer goes to make his rounds, doesn't he?

A. Yes, he knows it.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 130

MATHIASEN TANKER INDUSTRIES, INC.
Petitioner

versus

ROBERT LEE MASON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENT MASON

SIDNEY H. KELSEY
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Norfolk 10, Virginia
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IN THE

Supreme Court of the United States

October Term, 1961

No. 985

MATHIASEN TANKER INDUSTRIES, INC.,
Petitioner

versus

ROBERT LEE MASON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION BRIEF OF RESPONDENT MASON

OPINION BELOW

The Opinion of the Court of Appeals for the Fourth Circuit (Chief Judge Simon E. Sobeloff, Herbert S. Boreman, C. J.) is reported at 298 F. 2d 28 and dissenting opinion (Clement F. Haynsworth, Jr. C. J.) 298 F. 2d 33. These Opinions are also printed in Petitioner's Appendix pp. 2A-15A. Petitioner shipowner filed a petition for re-

hearing in the Court of Appeals, which was denied by the Court, the dissenting judge; Clement F. Haynsworth, C. J., joining in the denial of rehearing with the majority court.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was rendered on January 3, 1962. The Petition for rehearing in that Court was denied on March 22, 1962. The Petition for a Writ of Certiorari was filed on May 21, 1962. It is believed there is want of jurisdiction in this Court under Title 28, U. S. C., Sec. 1254(1) which is claimed by Petitioner, since these proceedings are neither final nor complete (See pp. 11, 12).

QUESTION PRESENTED

In this Jones Act (46 U. S. C. 688) case, the District Court jury found negligence and unseaworthiness of Petitioner shipowner upon separate interrogatories and thereupon fixed liability. Petitioner shipowner did not appeal. On separate interrogatory the District Court erroneously charged the jury on respondent seaman's contributory negligence based upon improper and unconnected evidence leading the jury to find contributory negligence. Respondent seaman appealed. The Court of Appeals reversed the District Court's erroneous charge on contributory negligence, ordering a new jury trial as to this, upon proof of proper evidence of contributory negligence, further ordering redetermination of damages which may be affected or mitigated by the new trial of issue of respondent seaman's contributory negligence, if any. The question presented is:

Whether the Court of Appeals can, where the issues are separable, order a new trial as to the appealed issue because of erroneous District Court charge on that issue.

STATUTES INVOLVED

The Statutes involved are the Jones Act, 46 U. S. C. 688, incorporating by its terms the Federal Employers Liability Act, 45 U. S. C. 51.

COUNTER STATEMENT OF THE CASE

This counter statement of the case is deemed necessary in correcting certain substantial and important inaccuracies and omissions in the shipowner's Petition. Respondent seaman Mason joined the vessel MISSION CAPISTRANO in the capacity of Oiler performing duties in the engine room of the vessel. Upon joining the vessel he found that the blower platform in the engine room continuously retained standing oil which came from the leakage of bearings of the blowers. He made complaints to the Chief Engineer because he had to wade through this oil each watch while performing his duties in oiling the blowers. The blowers which are power driven encased fans supplying air to machinery and forced draft to boiler furnaces are located at the top of the boilers resting on a steel platform. They are reached by a succession of steel ladders at different stages running from the bottom of the engine room upward to the ceiling. This machinery must be continuously oiled every hour by the Oiler on watch. After wading through the oil on each watch Mason attempted to wipe the oil from the leather soles of his shoes, carrying a rag for this purpose. Nevertheless, his only two pairs of shoes stayed continuously oil soaked. On the morning of September 29, 1958 after the vessel had left Norfolk and was at sea, Mason climbed up the succession of ladders to the top of the engine room to check the blowers. He had to wade through the oil on the platform in order to do so and wiped his shoes

off with his rag. After finishing his duties on the boiler platform he descended three sets of ladders safely to the ladder leading down to the evaporator flat. While beginning to descend this ladder with both hands on each side of the ladder railing, his right shoe soaked in oil, skidded under him and he plummeted head over heels down the ladder sustaining severe head and facial injuries, rendering him unconscious. He was taken off the ship at sea to the hospital at Charleston, South Carolina and later became interned at other hospialts.

At trial respondent seaman produced crewmen witnesses, all of whom testified about the standing oil being on the blower platform, the requirement that oilers including respondent must wade through it for their duties and the dangerous conditions created thereby. The shipowner produced no live witnesses as to the occurrence but submitted depositions. Previous to trial the respondent seaman's counsel had been informed that the shipowner's counsel proposed to introduce into evidence totally unrelated collateral incidents of Mason having fainted on two occasions in different engine rooms of different ships some years before; and that counsel would request the District Court to charge contributory negligence on this evidence, although there was no casual connection between Mason's present injuries and the totally unrelated fainting incidents of years past. After all of the evidence was in, notwithstanding that the shipowner had produced no casual connection between Mason's injuries and the unrelated fainting incidents of years ago, and notwithstanding the firm and repeated objections of Mason's counsel, the District Court erroneously charged the jury on Mason's contributory negligence based upon this improper evidence. The District Court further allowed shipowner's counsel to show that some "pills" were found in

plaintiff's effects after he was removed from the vessel, which were totally unrelated to plaintiff's injuries, but carried an ominous inference to the jury. In charging the jury on contributory negligence, the District Court in admitting this improper evidence on the issue of contributory negligence, failed to satisfactorily remove from the consideration of the jury the unconnected incident of the "pills" being found. The District Court then charged the jury that this contributory negligence would reduce the damages Mason was otherwise entitled to. In separate interrogatories the Court charged the jury (1) as to shipowner's negligence; (2) as to unseaworthiness of the vessel and; (3) the contributory negligence of seaman Mason. The District Court specifically charged the jury that their first issue for determination was the liability of the shipowner for negligence or unseaworthiness before they could consider either the contributory negligence of Mason or the damages he would be entitled to. The jury first found the shipowner guilty of both negligence and unseaworthiness. Having been erroneously charged by the District Court on the contributory negligence of Mason because of the totally unrelated and unconnected fainting incidents of a number of years past, the jury also found contributory negligence, rendering a totally inadequate award of Two Thousand ($2,000.00) Dollars. Mason had sustained a substantial economic loss of wages of over a years time and serious and permanent head and facial injuries.

Respondent Mason appealed the District Court's erroneous contributory negligence charge to the Court of Appeals seeking a new trial as to the issue of his contributory negligence which was found because of the District Court's erroneous charge. The shipowner Petitioner being content with the adjudication of its liability and the

totally inadequate award, did not appeal the judgment entered against it for its negligence and unseaworthiness.

The Court of Appeals, through Chief Judge Simon E. Sobeloff and Circuit Judge Herbert S. Boreman, held that the District Court erroneously charged the jury on contributory negligence and the shipowner having failed to appeal the determination of its liability, ordered a new trial as to the issue of contributory negligence and further redetermination of damages which may be mitigated by a finding of contributory negligence, if any.

Petitioner shipowner has been less than candid or fair with this Court in failing to point out that he does have a new jury trial to prove the contributory negligence, if any, of the respondent seaman. (See footnote 5, Court of Appeals Opinion; Pet. App. p. 11A). The Petitioner shipowner completely misleads this Court in its Petition in stating that the Court of Appeals remanded the case solely for the assessment of damages (Pet. pp. 3, 15). The omission to inform the Supreme Court of this part of the Court of Appeals remand for jury trial of contributory negligence is completely inexcusable.

ARGUMENT

POINT I. THE PETITION SHOWS NO REASONS FOR REVIEW, SINCE PETITIONER'S STATED QUESTION URGED HAS BEEN DECIDED MANY TIMES BY THIS COURT AND THERE IS NO CONFLICT WITH COURT OF APPEALS DECISION.

The shipowner's Petition and Appendix amounting to 56 pages contains neither a concise statement of the case nor is it presented with accuracy, brievity and clearness (see Supreme Court Rule 23 (1) (e), (4); Kennemer v. Billington, 323 U.S. 709 (1944); Brown v. Krietmeyer,

275 U.S. 496, 497 (1927)) but notwithstanding the rambling and indiscriminate citation of Supreme Court cases in the Petition, an attempt will be made to answer the argument it is believed the shipowner Petitioner is seeking to make. The Petitioner's question as to whether the shipowner in a Jones Act (46 U. S. C. 688) case has an equal right with the seaman to a jury determination of the issues, which the shipowner presents as "a single question of law which has never been considered by this Court" (Pet. p. 1), has frequently been answered by this Court. Unquestionably the shipowner in a Jones Act case brought by the seaman in a civil action at law, does have an equal right with the seaman to a jury determination of unseaworthiness, negligence, causation, contributory negligence, and damages in a trial of this action. Rule 38 of Federal Rules of Civil Procedure. The shipowner's Petition redundantly recites this. Indeed, the Petitioner shipowner here has had just that right which the decisions of this Court accord it. The shipowner has had a jury trial of its liability for negligence and unseaworthiness and the jury resolved these issues against it finding liability. The Court of Appeals gave a new trial whereby the shipowner can again contend for the contributory negligence of the respondent seaman and for a redetermination of the damages for such contributory negligence, if any, as proven by the shipowner. The shipowner has the burden of proving such contributory negligence. What the shipowner really seeks in this Petition is to secure a new jury trial of its liability which it has failed to appeal to the Court of Appeals.

The Petitioner has failed to show in its Petition any reasons for granting the writ and review of the case by the Supreme Court as is set forth in Supreme Court Rule 19. It is not shown that the Court of Appeals decision

here, conflicts with the decision of another Court of Appeals or the decision of this Court. The Petitioner's stated question is not important for review since it has been reviewed by this Court in the many cases cited in the Petition, nor does the lower court's decision call for an exercise of the Supreme Court's supervisory powers.

Under the Jones Act (46 U. S. C. 688), liability of the shipowner for negligence and unseaworthiness are separate issues from the issue of the seaman's contributory negligence, since the latter is not a defense to shipowner's liability but only mitigates damages the seaman would otherwise be entitled to. Pope & Talbot v. Hawn, 346 U. S. 406, 408, 409 (1953); Socony-Vacuum Oil Company v. Smith, 305 U. S. 424, 431 (1939). See also Federal Employers Liability Act, 45 U. S. C. 53, which is incorporated by express terms in the Jones Act, 46 U. S. C. 688, where contributory negligence is not a bar to liability but only goes to mitigate damages.

The Court of Appeals has held that the issue of Petitioner's liability, which it did not appeal, is separate from the issue of the contributory negligence, if any, of respondent Mason. Because of the erroneous charge on contributory negligence the Court of Appeals has remanded the case to the District Court for a new jury trial of contributory negligence and a redetermination of the damages which may be affected by the finding of contributory negligence.

Title 28, U. S. C., Sec. 2106 provides as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may re-

mand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

In Thompson v. Camp, 167 F. 2d 733 (6th Cir. 1948), cert. denied, 335 U. S. 824, the plaintiff suing under the Federal Employers Liability Act, 45 U. S. C. 51, recovered a judgment and the Court of Appeals reversed because of an erroneous charge given by the District Court on plaintiff's damages. Since the defendant's liability had been established in the trial court, plaintiff moved that the new trial be confined solely as to the issue of damages he would be entitled to. In awarding a new trial solely as to these damages, the Court stated, 167 F. 2d 734:

"In spite of the early common law rule to the contrary, it appears now settled that this Court has the authority to limit the issues upon remand to the District Court for a new trial; and that such action does not violate the Seventh Amendment to the U.S. Constitution. Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188; May Department Stores Co. v. Bell, 8 Cir., 61 F. 2d 830, 842, 843, and cases cited. See also Empire Fuel Co. v. Lyons, 6 Cir., 257 F. 890, 897; Rule 59, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c."

In Atkinson v. Dixie Greyhound Lines, Inc., 143 F. 2d 477 (5th Cir. 1944), cert. denied, 323 U.S. 758, where the District Court erroneously charged the jury with reference to damages and the Court of Appeals reversed for a new jury trial of that issue, the Court stated, 143 F. 2d 479:

"It is now well established, notwithstanding doubt expressed in some earlier cases as to the common-law

power of a reviewing court to limit issues when ordering a new trial, that when error exists as to only one or more issues and the judgment is in other respects free from error, a reviewing court may, when remanding the cause for a new trial, whether by the court or a jury, limit the new trial to the issues affected by the error whenever these issues are entirely distinct and separable from the matters involved in other issues and the trial can be had without danger of complication with other matters * * *." American Jurisprudence, Vol. 3; State Life Ins. Co. of Indianapolis v. Hardy, 189 Miss. 266, 195 So. 708, 714; Schuerholz v. Roach, 4 Cir., 58 F. 2d 32; Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188; Moore's Federal Practice under the New Federal Rules, Vol. 3, page 3248; Federal Rules of Civil Procedure, Rule 59(a), 1938 Ed. p. 125. 28 U. S. C. A. following section 723c."

See also Washington Gas Light Company v. Connelly, 214 F. 2d 254 (DC Cir. 1954); Pedersen v. United States, 224 F. 2d 212 (2d Cir. 1955).

It therefore seems clear that the Court of Appeals here has ample authority to remand this case to the District Court for a new trial as to contributory negligence, because of the erroneous court charge and for a further redetermination of damages. Norfolk Southern Ry. Co. v. Ferebee, 238 U. S. 269 (1915). Petitioner shipowner will therefore get another jury trial as to respondent Mason's contributory negligence, which if proven will reduce damages, but the Petitioner cannot get any further trial of its liability since it failed to appeal this determination to the Court of Appeals.

POINT II. THERE IS WANT OF JURISDICTION TO CONSIDER THE PETITION SINCE THE PROCEEDINGS ARE NEITHER FINAL NOR COMPLETE.

The status of the present case is that the Court of Appeals has sent the case back to the District Court for another jury trial on contributory negligence of the respondent seaman, because of errors committed in the first trial of this issue. Damages which are affected or mitigated by contributory negligence in a Jones Act (46 U. S. C. 688) case must necessarily here be redetermined by the jury. The shipowner Petitioner did not appeal the jury determination of its liability in the District Court. There is no finality in the proceedings since the issue of contributory negligence must be resolved in a new trial and there is no judgment as to damages which also must be resolved. This case is not complete nor final. It is not ripe for review.

In Arnold v. United States ex rel Guimarin, 263 U. S. 427 (1923), the Court of Appeals modified the District Court's judgment, ordering another jury trial as to certain issues. Because the proceedings were not ready for review this Court dismissed the petition for writ of certiorari for want of jurisdiction stating, 263 U.S. 434:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. Hohorst v. Hamburg-American Packet Co. 148 U.S. 262, 264, 37 L. ed. 443, 444,

13 Sup. Ct. Rep. 590; Collins v. Miller, 252 U.S. 364, 370, 64 L. ed. 616, 618, 40 Sup. Ct. Rep. 347; Oneida Nav. Corp. v. W. & S. Job & Co. 252 U.S. 521, 522, 64 L. ed. 697, 40 Sup. Ct. Rep. 357; and cases therein cited."

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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